

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1057-CR

Cir. Ct. No. 2011CF42

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG L. TUCHALSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Craig Tuchalski appeals a judgment of conviction and an order denying his postconviction motion. He contends that he is entitled to sentence modification or resentencing on the following grounds: (1) the court relied on inaccurate information in imposing his sentence; (2) the sentence

imposed was unduly harsh in comparison to the sentences of his co-defendants; and (3) the court erroneously exercised its discretion in denying him eligibility for the Challenge Incarceration Program (CIP) and the Earned Release Program (ERP). We reject each of these contentions. Accordingly, we affirm.

Background

¶2 In July 2011, Tuchalski pled no contest to manufacturing methamphetamine, and a charge of felon in possession of a firearm as a repeater was dismissed and read in. The charges stemmed from an investigation of suspected methamphetamine production in Tuchalski's home, involving Tuchalski, Tuchalski's ex-wife Candee McBride, and David Schreindl. During the execution of a search warrant at Tuchalski's home, Tuchalski informed investigators that Schreindl had taught him how to produce methamphetamine, that he produced methamphetamine in his home, and that he had McBride purchase methamphetamine ingredients for him. Tuchalski was sentenced to three years and six months of initial confinement and four years of extended supervision.

¶3 Tuchalski filed a postconviction motion challenging his sentence. He argued that the court had relied on inaccurate information in imposing his sentence, specifically that: (1) Tuchalski was the leader of the methamphetamine production; and (2) Tuchalski had a prior felony drug conviction. He also argued that his sentence was unduly harsh in comparison to the lesser sentences received by McBride and Schreindl. Finally, Tuchalski argued that the court erred by denying him eligibility for CIP and ERP, because Tuchalski had addiction issues that could be addressed in those programs.

¶4 The court found that it had not relied on inaccurate information in imposing Tuchalski's sentence, that it had properly relied on Tuchalski's individual characteristics and criminal history in imposing a sentence harsher than the sentences of Tuchalski's co-defendants, and that it had properly exercised its discretion in denying Tuchalski program eligibility. Tuchalski appeals.

Discussion

¶5 Tuchalski contends that the court relied on inaccurate information in imposing his sentence because it erroneously believed that: (1) Tuchalski was the leader of the methamphetamine production in this case; and (2) Tuchalski had a prior felony drug conviction. We conclude that the court did not rely on inaccurate information in imposing Tuchalski's sentence.

¶6 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A postconviction claim that a sentence was based on inaccurate information must show that the information was inaccurate and that the court actually relied on the information in imposing the sentence. *Id.*, ¶21. Here, Tuchalski asserts that the court erroneously believed that Tuchalski had the “lead role” in the methamphetamine production in his home. He argues that the court's belief that Tuchalski had the lead role in the methamphetamine production was directly contrary to facts establishing that Schreindl, not Tuchalski, played the lead role. Tuchalski points out that Schreindl was also charged in another county for methamphetamine production. He also points to an indication in the presentence investigation report that Schreindl had introduced Tuchalski to methamphetamine and taught him how to manufacture it.

¶7 We disagree with Tuchalski's assessment of the court's statements regarding Tuchalski's role in *this* case as contrary to the facts. The court stated: "Degree of culpability, making it, working with others, involving others, having others go out and buy ... the ingredients That's part of what transpired here. That's organization. That's the lead role." The court then noted that the facts indicated that Tuchalski was not distributing methamphetamine, but rather producing it for use by himself and his co-defendants.

¶8 Tuchalski does not dispute that he produced methamphetamine in his home and that he involved others in the production; he disputes only that he played the "lead role" in the operation. He argues that the facts clearly establish that Schreindl had the lead role, and the court failed to recognize that Schreindl occupied the lead role in this case. However, the court's failure to specifically recognize Schreindl's individual methamphetamine production and his connection to Tuchalski's methamphetamine production did not alter the accuracy of the information the court emphasized. That is, while the court did not take explicit note that Schreindl faced other criminal charges related to methamphetamine and that the PSI suggested that Schreindl had introduced Tuchalski to methamphetamine and taught him how to produce it, the court accurately stated Tuchalski's activities in this case. Moreover, the allegation that Schreindl introduced Tuchalski to methamphetamine use and production, even if true, does not negate the fact that Tuchalski then produced methamphetamine in his home and involved McBride in purchasing ingredients. We conclude that the court's characterization of Tuchalski's actions as representing the "lead role" in the production of methamphetamine in Tuchalski's home was not inaccurate, and thus does not support Tuchalski's argument that the court relied on inaccurate information in imposing his sentence.

¶9 Tuchalski also contends that the court relied on the inaccurate information that Tuchalski had a prior felony drug conviction. He asserts that, at a custody hearing between McBride and the father of McBride's child, the court excluded Tuchalski from the hearing, and erroneously referred to Tuchalski as a "convicted drug felon." He argues that the court's consideration of Tuchalski's criminal history in imposing sentence indicates the court believed that Tuchalski had a prior felony drug conviction. Again, we disagree.

¶10 The circuit court stated at the postconviction motion hearing that it did not believe that it had referred to Tuchalski as a "convicted drug felon," and that the court recalled excluding Tuchalski from the custody hearing because he was not a party in that case. Tuchalski does not point to any evidence in the record establishing that the court made the "convicted drug felon" comment at the custody hearing, nor does he cite any statements by the court at the sentencing hearing that it believed that Tuchalski had a prior felony drug conviction. We conclude that Tuchalski has not established that the court relied on inaccurate information as to Tuchalski's prior convictions.

¶11 Next, Tuchalski contends that his sentence was unduly harsh in comparison to the probation dispositions received by McBride and Schreindl. *See State v. Giebel*, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995) (explaining that the sentence of a similarly situated co-defendant is a relevant consideration in sentencing). Tuchalski points out that there is no evidence that McBride was an unknowing participant, and argues that there is evidence that Schreindl was more culpable than Tuchalski. He also argues that Schreindl, like Tuchalski, had a criminal record. We are not persuaded that the court imposed an unduly harsh sentence based on the lesser sentences received by Tuchalski's co-defendants.

¶12 The court noted Tuchalski's extensive criminal history, including felony convictions, in determining the sentence to impose. Additionally, the court considered Tuchalski's dismissed and read-in charge for felon in possession of a firearm. Tuchalski has not established that his sentence was unduly harsh in comparison to the sentences of his co-defendants, in light of those particular facts. *See Ocanas v. State*, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975) (no denial of equal protection based on different sentences for same conviction, based on different individual levels of culpability and need for rehabilitation).

¶13 Finally, Tuchalski argues the court erroneously exercised its discretion by denying him eligibility for CIP or ERP because the record shows Tuchalski would benefit from those programs. However, program eligibility lies within the court's discretion. *See State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. Here, the court explained it denied Tuchalski program eligibility based on Tuchalski's continued criminal activity following incarceration. Tuchalski's assertion that he would benefit from CIP and ERP does not establish that the court erroneously exercised its discretion by denying him eligibility. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

